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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

SENATOR BARRY GOLDWATER, ET AL., PETITIONERS

v.

JAMES EARL CARTER, PRESIDENT OF THE UNITED STATES, AND CYRUS VANCE, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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Petitioners, pursuant to Supreme Court Rule 24(5), hereby file this Supplemental Brief in further reply to Respondent's Brief in Opposition at page 16 concerning the original design and intent of the Framers. Respondent's argument is so contrary to the historical record that Petitioners believe it imperative to answer with the words of the Framers themselves which, because of time constraints, have not heretofore been brought to this Court's attention.

Respondents argue the Framers were silent on treaty termination both at the Constitutional Convention and in the document and would have the Court infer that the Framers meant for the President to act alone. Actually, the consistent statements and actions of at least twelve of the most prominent Framers and Founding Fathers, including George Washington, Thomas Jefferson, James Madison, John Jay, James Wilson, Alexander Hamilton, Gouverneur Morris, George Mason, C. C. Pinckney, Rufus King, Hugh Williamson, and James Iredell, prove that treaty termination was designed to be a shared power exercised by the President with some form of concurrence by the legislature.

Thus, John Jay declared in The Federalist:

> "They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them. . . ." The Federalist, No. 64, at 394 (Rossiter ed. 1861).

Respondents have claimed below that the words by John Jay are "ambiguous." (R. 397). The Nation's leading authority on John Jay disagrees. Professor Richard B. Morris, Gouverneur Morris Professor of History Emeritus at Columbia University and editor of The Papers of John Jay, states:

> "It just so happens that I have before me a copy of the original draft of 'Federalist' Letter No. 64 in Jay's own handwriting, with some variances from the published text. Throughout Jay is talking about treaty-making as a shared function, and it is a fair inference from his text that he would have regarded treaty termination in the same light." 125 Cong. Rec. S15718 (daily ed. Nov. 1, 1979).

In part Professor Morris relies on the fact that Jay's personal draft includes the following important sentence which was erroneously omitted in the newspaper edition:

> "With respect to the responsibility of the President and Senate, it is difficult to conceive how it could be increased." Id. (Emphasis added).

The inclusion of the missing sentence in the authentic draft of The Federalist proves beyond any doubt that Jay was thinking of joint action by the executive and legislative branches, and not action by the President alone, when he referred to the making and cancellation of treaties.

In explaining how a treaty could be terminated, even in case of a breach by the other nation, James Madison, the "Father of the Constitution," wrote on January 2, 1791:

> "That the contracting powers can annul the treaty cannot, I presume, be questioned, the same authority, precisely being exercised in annulling as in making a treaty." 1 Letters and Other Writings of James Madison 524-525 (1865) (emphasis added) 1/

1/ In Madison's words, there are three grounds for legislative participation: 1)"the power vested by the Constitution with respect to Treaties in the President and Senate makes them the competent Judges" of whether to terminate, 2)"as the treaty is a law, the whole Legislature are to judge of its annulment," and 3)"in case the President and Senate be competent in ordinary Treaties, the Legislative authority (may) be requisite to annul a Treaty of Peace, as being equivalent to a Declaration of War, to which that authority alone, by our Constitution, is competent." 1 Letters and Other Writings of James Madison 524-525 (1865). Thus Madison saw a rational basis for distinguishing between treaties according to their subject matter and relationship to other powers of the Congress.

In 1796, James Iredell, one of the leading figures in explaining the Constitution at the North Carolina ratifying convention, wrote that it is Congress alone "to whom, I conceive, the authority is entrusted" for "vacating" a treaty. 2/

In early 1801, when he was still Vice President, Thomas Jefferson wrote in the first manual of Senate procedure:

> "Treaties are legislative acts. A treaty is the law of the land. It differs from other laws only as it must have the consent of a foreign nation. . . .Treaties being declared, equally with the laws of the United States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded." T. Jefferson, A Manual of Parliamentary Practice for the Use of the Senate of the United States, Sec. LII (1801) (emphasis added.)

The statements of other Framers and Founding Fathers are all consistent with and supportive of the above stated conclusions by Madison, Jay, Iredell and Jefferson. For example, it is well known that the Framers were concerned with restoring dependability to our treaties and were anxious to gain the respect and confidence of foreign nations. Alexander Hamilton identifies the want of respect in our treaty relations as one of the most material defects under the Articles of Confederation meant to be cured by the Constitution. 3/ James Wilson, a signer of the Constitution and one of the original Justices of this Court, said at the Pennsylvania Convention to ratify the Constitution that Article III, respecting the judicial department, "will show the world, that we make the faith of treaties a constitutional part of the character of the United States... 4/

2/ See opinion by then Justice Iredell sitting as a circuit judge, reprinted in Ware v. Hylton, 3 U.S. 199 (1796).

3/ The Federalist no. 22, at 151 (Rossiter ed. 1961). In the preface to his notes on debates in the Constitutional Convention, James Madison identified several instances where treaties of the Confederation were violated. These depredations are catalogued by Madison among "the defects, the deformities, the diseases and the ominous prospects for which the Convention were to provide a remedy, and which ought never to be overlooked in expounding & appreciating the Constitutional Charter the remedy that was provided." 3 The Records of the Federal Convention of 1787, at 548-549 (M. Farrand ed. 1937) (hereinafter cited as Records).

4/ 2 The Documentary History of the Ratification of the Constitution 518 (M. Jensen ed. 1976).

It is difficult to believe the Framers, who regarded violation of "the sacred faith of treaties" as "wicked" and "dishonorable" and contrary to our best interests in gaining respect among other nations, would have made treaties repealable at the pleasure of the President alone. 5/

It is also well known that the Framers were concerned with protecting valuable commercial interests and securing increased trade rights. 6/ Specific concern was expressed against making it easy to abridge the common rights of navigation of the Lakes and the Mississippi River which had been won by the United States in the Peace Treaty with Great Britain. 7/ Other Framers mentioned the fear of the New England states that our fishery rights by treaty off Newfoundland might be easily given away. 8/ C. C. Pinckney, a member both of the Federal Convention and his state ratification convention, explained that South Carolina, "considering the valuable produce it has to export, is particularly interested in maintaining the sacredness of treaties." 9/ Gouverneur Morris also pointed to the conclusion that treaties were not to be easily cancelled when he said at the Convention that "the more difficulty in making treaties, the more value will be set on them."10/

5/ So said James Wilson in his Lectures on Law, 1 The Works of James Wilson 166-167 (R. McCloskey ed. 1967).

6/ E.g., 4 Records 58 (Madison's record of subject debated); 2 Records 449 (C.C. Pinckney), 452 (Madison). For a thorough discussion of the preoccupation of the Framers with economic and sectional interests when the treaty clause was debated in the Convention, see also Bestor, Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined, 5 Seton Hall L. Rev. 527, 613-619 (1974).

7/ E.g., 1 Records 308 (Hamilton); 3 Records 306-307 (H. Williamson).

8/ George Mason said in the Virginia Convention that "The Newfoundland fisheries will require that kind of security which we are now in want of . . ." 3 Records 335. Gouverneur Morris referred to"the Fisheries or the Mississippi (as) the two great objects of the Union." 2 Records 548. Surely the Framers did not intend to permit the giving away of these two great objects at the whim of a single officer of government.

9/ J. Elliot, 4 Debates in the Several State Conventions of the Federal Constitution 279 (1861).

10/ 2 Records 393 (emphasis added.)

Thus, the Framers sought to give each section of the country an opportunity to exert an influence in the legislature in deciding upon both the making and unmaking of treaties because of the direct effect either action would have upon strong economic or political interests in particular States or regions. The Framers clearly were as interested in protecting these regional interests by making it difficult to revoke beneficial treaties as they were in protecting those interests by guarding against harmful treaties.

Moreover, the intent of the Framers can be derived from their belief that the termination of any treaty, particularly an alliance, might lead to war with the injured nation. George Washington relied on exactly such a warning from his Secretary of State, Thomas Jefferson, in 1793 when he refused to denounce the treaty of alliance with France in part because "an injured friend is the bitterest of foes." Jefferson added that cancellation of the treaty would give "just cause for war" by our treaty partner. 11/

Respondents are correct in observing that the silence of the Constitution on treaty termination is "hardly surprising." But respondents draw the wrong conclusion from this fact. In the words of historian Arthur Bestor:

> "This silence can hardly be considered remarkable in view of the fact that the framers neither discussed nor provided for other comparable procedures notably the repeal of a statute once enacted. The principal concern of the members of these conventions was the proper allocation of the various positive powers of government. Only in exceptional instances did they give attention to the negative use of these powers--in other words, to procedures for undoing or reversing what had once been done." A Bestor, "Respective Roles of Senate and President in the Making and Abrogating of Treaties," 55 Washington Law Review 1, text accompanying notes 67-68 (1979) (to be published).

11/ The Writings of Thomas Jefferson 225, 231 (P. Ford ed. 1895). Rufus King, one of the Framers, similarly advised Alexander Hamilton that the President would not be justified by law in saying the treaty was terminated. D. Malone, Thomas Jefferson and the Ordeal of Liberty 74 (1962). Contrary to the implication of Respondents' Brief in Opposition at page 16, note 7, Hamilton never claimed the French Alliance was "terminated." He agreed as a member of Washington's Cabinet the treaty was not void, but later wrote it could be temporarily "suspended" because the alliance was defensive only and France had initiated offensive war against most of the rest of Europe. VII Hamilton's Works 83-93 (1850-51).

Furthermore, in the absence of specific constitutional instruction on revocations, reversal by those branches participating in the adopting process is the logical procedure of effecting any repeal. This principle was so firmly established in English law that it was adopted in America without question. 12/ Blackstone's famous Commentaries on the Laws of England, which was available to the Framers, gave repeated emphasis to the maxim "that it requires the same strength to dissolve, as to create an obligation." 13/

In summary, it is clear the Framers intended the same principle - that the power to unmake is a corollary of the power to make - to apply to the termination of a treaty, as to the repeal of other law. 14/

12/ Bestor, supra, at text accompanying note 74.

13/ William Blackstone, 1 Commentaries on the Laws of England 160-161, 185-186 (4th ed. 1770). The fourth edition is the one from which the first American edition was reprinted at Philadelphia in 1771-1772.

14/ Also, the Framers may well have been guided by their knowledge that Congress alone could annul a treaty for the United States under the Articles of Confederation. In referring to the Continental Congress, Hamilton advised Jefferson: "It is an obvious truth, and is so stated, that Congress alone has the right to pronounce a breach of the treaty." 6 The Writings of Thomas Jefferson 7 (P. Ford ed. 1895). Absent specific instruction in the Constitution, it is reasonable to conclude that the Framers meant for the legislature to continue to exercise some role in treaty termination, as it had done in the past, insofar as consistent with the other provisions of the document.

Respectfully submitted,

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